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CHARLES ELMORE
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Supreme Court of the United States.

OCTOBER TERM, 1948.

No. 335

JOSEPH MARTINELLI & CO., INC.,
Petitioner,

v.

L. GILLARDE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

ARTHUR V. GETCHELL,
Attorney for Petitioner.

SILVIO MARTINELLI,
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PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of Joseph Martinelli & Co., Inc., respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

1. The petitioner is a corporation duly established under the laws of the State of Massachusetts and has its principal place of business in Springfield, in said Commonwealth, where for many years it has been engaged in the wholesale fruit and produce business. At all times here material the petitioner has been duly licensed under the provisions of the Perishable Agricultural Commodities Act of 1930, 7 U.S.C., sections 499a *et seq.*

2. On or about June 21, 1943, the petitioner, Joseph Martinelli & Co., Inc., of Springfield, Massachusetts, purchased from the respondent, L. Gillarde Company of Chicago, Illinois, a carload of cantaloups f.o.b. Yuma, Arizona, for the sum of $1843.25 on a rolling acceptance final

basis. The cantaloups were stated to be U.S. No. 1 grade at shipping point. They had been inspected at the shipping point on June 20, 1943, the date of shipment, and in fact graded U.S. No. 1. They arrived in Springfield on July 3d. On July 5th the petitioner wired the respondent that it was rejecting the melons. An agent of the United States Department of Agriculture made an inspection of the shipment in Springfield on July 6th which showed many overripe and soft melons. He found that the cantaloups contained decay ranging from 35% in some samples to 100% in others, averaging approximately 85%, mostly Cladosporium Rot. The respondent refused to take the melons back and they were abandoned to the railroad company, which sold them for $300. They had not moved under normal transportation services and conditions and on August 31st a claim was filed against the railroad on behalf of the respondent for $1759.50, the invoice cost to it. This claim was settled on the basis of 50%, or $879.75. After collection costs of $175.95 were deducted, the respondent netted $703.80. The petitioner was not consulted in the making of the claim against the railroad and did not take any action in regard to it. The petitioner has not paid any part of the contract price to respondent.

Section 2 of the Perishable Agricultural Commodities Act provides that it shall be unlawful for a dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold in interstate commerce. Section 5 provides that any dealer who violates any provision of section 2 shall be liable to the person injured thereby for the full amount of damages sustained in consequence of such violation. This liability may be enforced either by complaint to the Secretary or by suit in any court of competent jurisdiction. Section 6 provides for filing of complaints with the Secretary of Agriculture. Section 7

provides that, if the Secretary determines that any party has been injured by a violation of section 2, he shall determine the amount of damage done and issue a reparation order. Any party adversely affected by the entry of a reparation order may appeal to a District Court. The suit in the District Court is a trial *de novo* and proceeds in all respects like other civil suits for damages except that the findings of fact and orders of the Secretary are *prima facie* evidence of the facts contained therein.

On August 19, 1943, an informal complaint was filed with the Secretary against the petitioner on account of the rejection of the cantaloups and on October 11, 1944, a formal complaint was filed. After a hearing the Secretary of Agriculture concluded that, "since the sale to petitioner was on 'a rolling acceptance final' basis, the petitioner had no right of rejection but was limited to the recovery of damages from the seller for a breach of contract, if such could be shown." The rejection of the cantaloups was found to be without reasonable cause and in violation of section 2 of the Act. On July 3, 1946, the petitioner was ordered to pay to the respondent within thirty days as reparation the sum of $1139.45, the contract price less the net recovery from the railroad, with interest thereon at 5% per annum from July 5, 1943, until paid. *L. Gillarde Co.* v. *Joseph Martinelli & Co., Inc.*, 5 A.D. 555. Petitioner appealed to the District Court, filing a bond for $2500.

The District Court accepted the findings of fact of the Secretary of Agriculture and adopted them as part of its findings of fact. It also found that the cantaloups were not in fact U.S. No. 1 melons at the point of shipment as required by the contract but were inherently defective in that they were infected with Cladosporium Rot. It held that the cantaloups did not meet the warranties of description and quality; that the petitioner was justified under the Uniform Sales Act in rejecting them; and that the

order of the Secretary of Agriculture should be overruled. *L. Gillarde Co., Appellant,* v. *Joseph Martinelli & Co., Inc., Appellee,* 73 F. Supp. 293 (1947) (R. 25). Judgment was entered for the petitioner and the respondent appealed.

3. The case was then heard in the Circuit Court of Appeals for the First Circuit, which, on May 17, 1948 (R. 35), rendered an opinion holding that under the regulations promulgated by the Secretary of Agriculture under the authority of section 15 of the Perishable Agricultural Commodities Act the petitioner had no right to reject the shipment, but also holding that the petitioner did not thereby lose its right to recoup damages against the respondent. The judgment of the District Court was ordered vacated and the case remanded for further proceedings. Thereafter the respondent filed a petition for rehearing, which was granted, and the United States of America as *amicus curiae* was permitted to file a brief on the ground that the United States Department of Agriculture had an interest in the matter, because of its responsibilities under the provisions of the Perishable Agricultural Commodities Act. After rehearing the Circuit Court of Appeals on July 8, 1948 (R. 53), rendered a decision which held that, because of the petitioner's wrongful rejection of the shipment, it had no right to recoup damages against the respondent on account of its breach of contract. The judgment of the Circuit Court of Appeals entered May 17, 1948 (R. 35), was vacated, the judgment of the District Court of August 27, 1947 (R. 25), was ordered vacated, and the case was remanded to that Court for the entry of judgment in accordance with the decision of May 17, 1948, as amended by the opinion of July 8, 1948.

B.

Jurisdiction.

Since this case involves the construction of a Federal statute, to wit, Perishable Agricultural Commodities Act of 1930, 7 U.S.C. section 499a *et seq.*, this Court has jurisdiction to grant this petition pursuant to the provisions of Title 28, United States Code, section 1254.

C.

Reasons Relied on for the Allowance of the Writ.

The Circuit Court of Appeals erred in holding that the petitioner had no right to reject the shipment.

The Circuit Court of Appeals erred in holding that the regulations promulgated by the Secretary of Agriculture under the authority of section 15 of the Perishable Agricultural Commodities Act prevented the petitioner from rejecting the shipment pursuant to the provisions of section 69 of the Uniform Sales Act (Mass. General Laws (Ter. Ed.) chapter 106, section 58).

The Circuit Court of Appeals erred in holding that the petitioner's rejection of the shipment was unreasonable within the meaning of the Perishable Agricultural Commodities Act.

The Circuit Court of Appeals erred in holding that the rejection of the shipment by the petitioner had the effect of causing it to lose its right to recoup damages against the respondent on account of its breach of contract.

The Circuit Court of Appeals erred in holding that the regulations promulgated by the Secretary pursuant to section 15 of the Perishable Agricultural Commodities Act were valid and binding upon the petitioner.

The decision of the Circuit Court of Appeals in this case has decided an important question of Federal law which has not been, but which should be, settled by this Court.

D.

Questions Presented.

Did the provisions of the Perishable Agricultural Commodities Act and the regulations of the Secretary of Agriculture promulgated thereunder have the effect of making it wrongful for the petitioner to reject the shipment?

Did the petitioner's rejection of the shipment prevent it from recouping damages against the respondent on account of the latter's breach of contract?

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the First Circuit, commanding that Court to send to this Court for its review and determination, on a day certain to be herein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 4322, *L. Gillarde Company, Appellant,* v. *Joseph Martinelli & Co., Inc., Appellee,* and that said judgment of the Circuit Court of Appeals for the First Circuit may be corrected by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

Respectfully submitted,

ARTHUR V. GETCHELL,
Attorney for the Petitioner.

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EMERSON S. SEARLE,
OF COUNSEL.

Supreme Court of the United States.

OCTOBER TERM, 1948.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The two opinions of the Circuit Court of Appeals for the First Circuit in this case are reported in the record, pages 35, 53.

II.

Jurisdiction.

The date of the final judgment of the Circuit Court of Appeals for the First Circuit in this case is July 8, 1948.

The jurisdiction of this Court to grant certiorari as prayed is founded upon Title 28, United States Code, section 1254.

III.

Statement of the Case.

A statement of the case has been given under the heading "A" in the petition, and in the interest of brevity the statement is not repeated at this point.

IV.

Specification of Errors.

A statement of the specification of errors has been substantially given under heading "C" in the petition and in the interest of brevity is not repeated at this point.

V.

Summary of Argument.

Clause 2 of section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. 499b) provides that "It shall be unlawful . . . for any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer."

There is no definition in the Act itself of the meaning of the phrase "without reasonable cause."

The power of the Secretary of Agriculture to make rules, regulations and orders is found in section 15 of the Perishable Agricultural Commodities Act (7 U.S.C. 499o). The authority is conferred by the following words: "The Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of this chapter . . ." The following sentence appears at the end of said section: "This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this chapter; but it is intended that

all such statutes shall remain in full force and effect except insofar only as they are inconsistent herewith or repugnant hereto."

There is nowhere in the Act any other provision giving the Secretary of Agriculture power to define the meaning of words or trade terms which may be used in contracts for the purchase or sale of agricultural commodities. Neither is there any provision in the Act itself which confers upon the Secretary the power to define the meaning of the words "without reasonable cause" which appear in section 2, clause 2, of the Perishable Agricultural Commodities Act. No provision of the Act itself deprived the petitioner of the right to reject the shipment under the circumstances disclosed in this case. The opinion of the Court below holding that the petitioner had no such right was based upon the assumed validity of the regulations promulgated by the Secretary, which are fully set forth in the first opinion of the Court below and appear in the record at pages 38, 39, 40. No provision of the Act itself deprives a buyer of the right to recoup damages from the seller on account of breach of contract in a case where the buyer has rejected a shipment without reasonable cause.

VI.

Argument.

The finding against the petitioner in the Court below is predicated upon a finding that the cantaloups were purchased on a "rolling acceptance final" basis and upon the assumed validity of the regulations promulgated by the Secretary of Agriculture, which appear in the record at pages 38, 39, 40.

The petitioner submits that the power of the Secretary of Agriculture to make rules, regulations and orders is limited by the provisions of section 15 of the Act itself.

He can make only such as "may be necessary to carry out the provisions of this chapter." He has no power to enlarge the Act itself. In commenting upon a somewhat similar situation where the power of the Secretary of the Interior to make rules and regulations was called in question, Mr. Justice McKenna in the case of *United States* v. *United Verde Copper Co.*, 196 U.S. 207, at 215, used the following language:

> "If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

The petitioner further submits that the Court below was right when it held in the opinion which it first rendered that the petitioner was entitled to recoup damages against the respondent and that it was error for it to decide to the contrary as it did in the opinion which it finally rendered in the case.

There is nothing in the body of the Act itself which requires such a result. Such a conclusion is at variance with the spirit of the Act taken as a whole. The Secretary of Agriculture has no authority by rule, regulation or order to deprive the petitioner of such an important right. The respondent in this case is attempting to compel the petitioner to pay the contract price for merchandise which the respondent failed to ship or deliver. The finding of fact made by Healey, J., which appears at the foot of page 28 of the record is explicit to the point that the melons when shipped were infected with Cladosporium Rot, a disease of field origin which causes the melons to decay as they ripen, and that they were not in fact of U.S. No. 1 grade. They were inherently defective.

The petitioner submits that there is nothing in the Act itself which requires a conclusion that the rejection under such circumstances is without reasonable cause. The petitioner further submits that the Act itself gave the Secretary of Agriculture no authority to make rules, regulations or orders which would require or compel such a conclusion. The petitioner further submits that the Secretary of Agriculture had no authority to promulgate any rules, regulations or orders which would have the effect of preventing the petitioner from rejecting the shipment pursuant to the provisions of the Uniform Sales Act, section 69 (Mass. General Laws (Ter. Ed.) chapter 106, section 58).

VII.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that justice should be done, and to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the First Circuit, and correct said judgment.

Respectfully submitted,

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